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Michael Mac Neil

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Résumé de l'article

Les syndicats canadiens affrontent un ensemble de circonstances sociales, économiques, juridiques et politiques susceptibles d'avoir une forte influence sur leur avenir. Le mouvement syndical est engagé dans un processus de réévaluation de son rôle au sein de la société canadienne, et l'une des avenues que les syndicats doivent envisager, c'est la mesure dans laquelle il leur faut participer aux affaires politiques. Cet article passe en revue quelques-unes des options qu'ils ont choisies dans le passé et examine certains types d'activité politique vers lesquels ils peuvent aujourd'hui s'orienter. L'accent est mis sur les contraintes juridiques pouvant entraver l'action politique des syndicats.

L'auteur étudie tout particulièrement les obstacles au droit de grève, à l'utilisation des cotisations syndicales à des fins politiques et au droit des syndicats de participer à des campagnes électorales. Ces contraintes se retrouvent dans les lois générales qui régissent la négociation collective, dans l'interprétation judiciaire, administrative et arbitrale de ces lois et des conventions collectives, dans les restrictions constitutionnelles en matière de libertés individuelles, dans les lois électorales et dans le droit de propriété et les prérogatives directoriales des employeurs. La thèse mise en avant veut que les limitations imposées à l'activité politique des syndicats traduisent la conception à la fois individuelle et libérale de la législation canadienne qui considère avec méfiance le concept des droits collectifs. De plus, les restrictions favorisent la croyance libérale de l'existence d'une dichotomie entre les sphères d'action politique et les domaines de nature économique ou sociale. On a tendance, par exemple, à ne voir dans les grèves politiques, comme trait caractéristique, que leurs seules conséquences économiques, tendance qui laisse une plus grande latitude aux syndicats dans la négociation collective que dans la recherche d'objectifs politiques.

Finalement, l'article souligne le peu de succès des syndicats canadiens dans l'établissement de bases solides en ce qui a trait à l'exercice du pouvoir politique. On ne peut qu'attribuer en partie seulement cette situation aux contraintes juridiques et il est souhaitable que les syndicats ne s'en tiennent pas uniquement à améliorer la protection légale de leur participation à l'action politique, mais aussi qu'ils incitent leurs membres à des formes variées d'échanges capables de développer leur engagement politique. C'est la condition essentielle pour que leur action soit efficace.

Unions, Politics and Law in Canada

Michael Mac Neil

This paper reviews some of the options that unions have followed in the past, and details some of the types of political activities in which unions can presently engage. The focus is on various legal constraints that may hinder union political activity.

Canadian unions in the 1980's face a set of economic, social and political circumstances which have the potential to significantly alter their power and influence in Canadian society. Like other Western industrial nations, Canada has had a continued period of high unemployment which has consequently affected the bargaining power of workers¹. Canadian governments have indicated an increasing willingness to abandon many of the traditional protections given to trade unions, and in particular have become much more reluctant to allow the use of the strike as a means of exerting pressure on employers to agree to terms and conditions of work². Canada has traditionally had one of the highest strike records of Western democracies, despite the existence of a range of legal prohibitions on the right to strike that are as great as those in any other democracy.

Unions are also facing the spectre of extensive realignment of industrial structures. The present Conservative government in the federal sector, and a number of provincial governments are committed to the privatization and deregulation of many government owned or regulated industries. There has also been an accord on free trade signed with the United States which the

* MAC NEIL, M., Associate Professor, Department of Law, Carleton University.

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¹ The official unemployment rate in Canada during the 1980's was:

1980	7,5%	1982	11,0%	1984	11,3%	1986	9,6%
1981	7,5%	1983	11,9%	1985	10,5%		

Source: *Current Industrial Relations Scene in Canada: 1987*, Kingston, Industrial Relations Centre, Queen's University, 1987.

² An excellent account of the trend towards prohibition of strikes in Canada is found in L. PANITCH and D. SWARTZ, *From Consent to Coercion: The Assault on Trade Union Freedoms*, Toronto, Garamond Press, 1985.

union movement fears will lead to both the loss of manufacturing jobs to lower paid competitors in the United States and to inexorable demands for limits or cutbacks in wages for unionized Canadian workers.

As well, the unions are forced to operate in a new legal environment since the implementation of the *Canadian Charter of Rights and Freedoms* in 1982³. This constitutional bill of rights is an essentially individualist document which may lead to the subjugation of collective action to individual rights. Although the Charter guarantees the freedom of association, there are already indications that it is the negative aspect of that freedom, the right not to associate, which will have the most substantial impact on the labour movement.

Given this conjuncture of circumstances, it is appropriate to consider what role unions can be expected to play in the future. Canadian unions have been much more successful than their British or American counterparts, although not entirely so, in maintaining their membership as a proportion of the working force. As can be noted from Table 1, Canada is the only one of the three nations to have more unionized workers in 1986 than it had in 1981. Nevertheless, one must question whether this success is likely to continue if the constraints on collective bargaining caused by economic, political and social conditions continue. One of the avenues which unions must effectively exploit if they are to remain relevant to workers is to become a more cogent political voice for the labour movement. Canadian unions have had and continue to have an uneven record in this regard. One of their more notable and recent omissions was their failure to participate in the debate over the introduction of the Charter of Rights and Freedoms and, in particular, the failure to try to obtain explicit protection for the right to strike⁴.

The idea that trade unions should act as the political voice of labour, rather than merely as the collective bargaining representative of workers, is a controversial one. On the one hand, it accords with modern theories of the pluralistic nature of democratic states, while on the other it is in conflict with liberal principles of individual autonomy that emphasize the role of voting as the legitimate mechanism for the exercise of citizenship rights. Even when it is accepted that trade unions are legitimate spokespersons for labour in the political forum, inaccurate assumptions are made about the power that trade unions wield. In particular, it is assumed that trade unions

3 Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act, 1982* (U.K.) 1982, c. 11 [hereinafter, Charter].

4 This is discussed in J. WEILER, «The Regulation of Strikes and Picketing Under the Charter», in J. WEILER and R. ELLIOTT (eds.), *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1986, at p. 211.

are evenly balanced with the representatives of business interests, and that the state merely acts as a neutral arbiter, helping the parties achieve a consensus where possible, and if not, imposing solutions which reflect the balance of power⁵.

Table 1
Union Membership in Canada, United Kingdom and the United States
(1981-1986)

Year	Total Membership ('000)			As a % of Non- Agricultural Workers		
	Canada	U.K.	U.S.	Canada	U.K.	U.S.
1981	3,487	12,106	20,647	36	56	23
1982	3,617	11,593	19,571	39,0	n.a.	21,9
1983	3,563	11,236	18,634	40,0	54	21
1984	3,651	10,994	18,306	38	53	19
1985	3,666	10,716	16,996	37	51	18
1986	3,730	n.a.	16,975	37,7	n.a.	17,8

Sources: *The Current Industrial Relations Scene in Canada, 1986; Employment Gazette* (U.K.).

There are a diversity of strategies open to trade unions in representing workers. At one end of the continuum unions could claim to be solely concerned with promoting the economic interests of their members through collective bargaining with employers and simultaneously insisting on the non-intervention of the state. This stance was adopted by many United States trade unions in the early part of this century⁶. On the other end of the continuum are close alliances between trade unions and political parties which are either the founders of or are founded by the trade unions. At other points on the continuum there may be very close relationships between trade

⁵ This assumption is especially apparent in the recent decisions of the Supreme Court of Canada holding that the Charter guarantee of freedom of association does not place limits on the right of government to legislatively prohibit strikes. See especially, *Reference Re Public Service Employment Act, Labour Relations Act and Police Officers Collective Bargaining Act*, (1987) 38 D.L.R. (4th) 161, [1987] 3 W.W.R. 577, 87 C.L.L.C. 14,021. An analysis of why it is inappropriate to treat trade unions and business organizations as equal interest group representatives is set out in C. OFFE and H. WIESENTHAL, «Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form», 1980, 1 *Political Power and Social Theory* 67.

⁶ C. TOMLINS, *The State and the Unions: Labour Relations, Law and the Organized Labor Movement in America 1880-1960*, Cambridge, Cambridge University Press, 1985.

unions and the state through corporatist tripartite arrangements as have been evident in Western Europe,⁷ or a more detached policy of supporting political parties, candidates or issues on an *ad hoc* basis.

The history of Canadian trade union's political activity demonstrates a lack of consensus about the appropriate role for unions in representing workers in the political forum. Canadian unions, compared to their counterparts south of the border, have been much more willing to press for state intervention in industrial relations, regulation of workplace conditions and in implementing many constitutive institutions of the welfare state⁸. While some labour leaders were willing to concentrate on pressuring the government of the day for reform, others saw the most appropriate role of trade unions as encouraging independent labour parties to act as their representatives in the political forum. From time to time this advocacy resulted in significant support for labour parties, the most notable example being the participation of a labour party in a coalition government in Ontario in 1919⁹. Other more radical labour activists called for rejection of traditional political participation, advocating union militancy and the use of economic power, including the general strike as a means of achieving political, social and economic change.

More recently we see that the Canadian trade union movement has been willing to ally itself with the New Democratic Party, and to help finance and canvass on behalf of that party¹⁰. It also continues to act as a pressure group supporting a wide variety of public policy goals. In a number of instances, unions have also been willing to engage in strikes as a form of political protest and pressure. What is clear is that given the extremely pervasive role of the state in regulating the economy, unions, even by engaging in collective bargaining, are playing a political role¹¹.

7 JACOBI, JESSOP, KASTENDIEK and REGINI, eds., *Economic Crisis, Trade Unions and the State*, London, Croom Helm, 1986.

8 M. ROBIN, *Radical Politics and Canadian Labour 1880-1930*, Kingston, Ont., Industrial Relations Centre, Queen's University, 1968.

9 B. PALMER, *Working Class Experience*, Toronto, Butterworth's, 1983.

10 It should be noted that not all segments of the union movement have been willing or able to align itself with the New Democratic Party. For instance, unions representing government employees may be legislatively prohibited from financially supporting a political party, while other unions, such as many building trade unions in Canada, are ideologically opposed to such an alliance. Furthermore, it is only union locals which can affiliate with the Party and their subordination to the voting power of constituency delegates provides few incentives for affiliation. In 1982 only 14.2% of members in unions affiliated with the Canadian Labour Congress were also affiliated with the NDP: Keith ARCHER, «Canadian Unions, the New Democratic Party, and the Problem of Collective Action», 1987/Fall, 20 *Labour/Le Travail* 173.

11 C. CROUCH, *The Politics of Industrial Relations*, Manchester, Manchester University Press, 1979.

There are a number of factors that limit the political effectiveness of trade unions. These include the difficulties in defining the interests of workers as a class, and various barriers to clear articulation of those interests, which include lack of resources, inappropriate organizational structures,¹² the dynamics of bureaucratic leadership and ideological beliefs about the appropriate form of representation¹³. There has in particular, been certain political forms imposed on worker associations which limit either the types and objects of demands that they may legitimately make and limit the tactics they are permitted to employ in struggles for these demands¹⁴. There are a variety of legal constraints placed on the form which trade union's political role may take. In particular, limits on the right to strike, limits on union partisan activities arising from employer property rights, election laws, limits on spending of union dues arising from legislation and individual constitutional rights will be canvassed. These limits reflect a concern for individualizing rights and controlling group power.

This paper will focus on the legal constraints that have been faced by Canadian trade unions in the political forum.

POLITICAL STRIKES

From one perspective, all strikes must ultimately be viewed as political events because they involve a clash over the distribution of power in the workplace flowing from the ability and desire of working people to act collectively¹⁵. However, for our purposes, we will focus on the right of trade unions to engage in strikes the primary purpose of which is to protest or influence governmental legislative or administrative policy. In other words, these strikes are not primarily designed to force an employer to agree to terms and conditions of employment.

12 This factor is especially important in a federal state like Canada, where much of the constitutional jurisdiction over labour relations rests with the provinces, while the federal government retains the control of macroeconomic policy. Further complications arise from the localized nature of many bargaining structures and the prevalence, albeit declining, of international (i.e. American) trade unions.

13 For instance, a major difference in approach to political activity can be discerned between the Canadian Labour Congress, which actively supports the New Democratic Party, and the Canadian Federation of Labour which relies more exclusively on lobbying and *ad hoc* support of whichever party or candidate it thinks is most likely to advance its interests.

14 OFFE and WIESENTHAL, *op. cit.*, note 5.

15 HERON and PALMER, «Through the Prism of the Strike: Industrial Conflict in Southern Ontario 1901-14», in J.P. GRAYSON ed., *Class, State, Ideology and Change*, Canada, Holt, Rinehart and Winston of Canada Ltd., 1980.

What is immediately apparent, however, is the extremely limited resort to political strikes in Canada. The Winnipeg General Strike of 1919, commonly regarded as one of the most politicized strikes in Canadian history, was not initially a political strike according to our definition. The primary purpose of the strike was to force employers to recognize and bargain with the unions, but ultimately it can be viewed as political in character because of the nature of governing power exercised by the workers during the strike¹⁶. The only truly general political strike was the National Day of Protest undertaken in 1976 to protest against federal wage controls. This one day nation-wide strike was the largest ever in Canada. As well, there have been political strikes in British Columbia in 1983 against the provincial government's sweeping proposals to alter a wide range of existing statutory institutions and worker protections;¹⁷ a province wide, one day general strike in British Columbia in 1987 to protest significant changes to the province's labour legislation; and a one day strike in 1987 by Ontario brewery employees to protest free trade¹⁸. The reluctance of the labour movement to engage in such forms of protest is partly explained by the significant legal restrictions on the right to engage in political strikes.

Workers as individuals have the right to exercise their political liberties in the same way as other citizens. There are many who believe that the only legitimate political rights are the right to vote and the right to freedom of expression. The right to strike is not perceived in any way as connected with the exercise of political liberty. Although a right to strike has been legislatively recognized as an important component of our industrial relations system, the actual use of the right is viewed by some as a failure of other elements of the system to function properly. The overarching commitment of the state in a capitalist society to promote industrial peace and maintain productivity has led to severe restrictions in Canada on the right to strike which put workers who strike for political purposes in an extremely precarious legal position.

16 D.J. BERCUSON, *Confrontation at Winnipeg: Labour, Industrial Relations and the General Strike*, Montréal, McGill-Queen's University Press, 1974. The workers took control of many of the functions normally performed by municipal government, and exercised the power to determine which employers could continue to operate. That the strike was viewed as a political event can be seen from the subsequent conviction of some of the strike leaders for seditious conspiracy: *The King v. Russell*, (1920) 51 D.L.R. 1 (Man. C.A.).

17 For a critical account of union involvement in the protest against the statutory reforms introduced by the conservative Social Credit government of the province, see B. PALMER, *Solidarity: The Rise and Fall of an Opposition in British Columbia*, Vancouver, New Star Books, 1987.

18 The employers, while disapproving of the unions' methods, refused to take disciplinary action against the strikers because they sympathized with the workers' cause, *Globe & Mail*, 10 Sept. 1987.

For many workers, such as a large proportion of public workers in essential services, and those not represented by unions, strikes are completely banned. This is done by express legislative decree or by excluding these workers from protective labour legislation.

Even the right to strike is significantly restricted by limits on when strikes can occur. In particular, strikes are generally banned during the term of the collective agreement, either by legislative decree or by the express terms of the contract. Even when no agreement is in effect, a strike may occur only after the conciliation procedures have been exhausted and, in some jurisdictions, strike votes have been held and appropriate notice of the strike has been given. The likelihood of different unions being able to coordinate a legal political strike are infinitesimal. Hence a general strike would, for most workers, probably be illegal.

In a number of cases, including many arising from the National Day of Protest in 1976, unions attempted to argue that their actions should not be subject to legal sanction. The arguments were of two kinds. Firstly, it was claimed that the walkouts did not constitute a strike as defined by the applicable legislation. Secondly, it was argued that even if there was a breach of the statute, there was a constitutional limit to a province's power to interfere with fundamental freedoms of speech and expression and right to use concerted activity as a form of political protest.

The Ontario Divisional Court, with respect to the latter argument, stated that:

the withdrawal from the community of any of the factors of production, whether capital, labour or resources, as a result of concerted (not individual) action, in my opinion, is not an aspect of the fundamental freedoms of speech and expression, association, religion, or the press. Nor is it a freedom standing by itself. When carried to a sufficient degree, such concerted action must result in holding the local or national society hostage to secure the aims of the participants. That is not freedom of speech; it is coercion that, so far from ensuring the free working of parliamentary institutions, must ultimately impair it.¹⁹

This passage demonstrates one theme often used to justify limitations on union political activity: the fear that unions may be able to wield such extensive power as to impose its will (which is assumed to be representative of a minority viewpoint) on the majority. The irony is that while there are legislative restrictions on the right of one of the factors of production to be withdrawn (labour), no such corresponding restrictions are placed on the withdrawal of capital. Hence employers are able to and often have succeed-

¹⁹ *Re United Glass & Ceramic Workers of North America and Domglas Ltd.*, (1978) 19 O.R. (2d) 353, 363.

ed in influencing legislative policy by threatening to withdraw capital or by indicating legislative policy will influence future decisions about where to invest²⁰.

The argument that work stoppages designed to influence legislative policy are not really strikes at all and therefore not prohibited by labour legislation has had limited success. The definition of strike used in Canadian labour legislation tends to follow one of two models. A strike has either two or three elements:

- (1) a concerted refusal to work;
- (2) designed to restrict or limit output, and (in some jurisdictions);
- (3) the refusal to work is for the purpose of obtaining concessions from an employer.

In *Re United Glass & Ceramic Workers of North America and Domglas Ltd.*,²¹ it was held that by defining «strike» without reference to its purpose (the third element described above) the Ontario *Labour Relations Act* makes no distinction between political protests and other kinds of work stoppages: all are prohibited if they do not occur within the time permitted by the statute. It may be possible to argue that the work stoppage is not a strike because there is no concerted refusal to work²². However, political strikes are likely to be concerted actions and labour boards are likely to presume concerted action when many workers simultaneously fail to show up for work²³.

20 H. GLASBEEK, «Law: Real and Ideological Constraints on the Working Class» in D. GIBSON and J. BALDWIN eds, *Law in a Cynical Society? Opinion and Law in the 1980's*, Calgary, Carswell, 1985. Recent evidence of such pressure being exercised by large businesses can be seen in the passage of amendments to the Nova Scotia *Trade Union Act* to deter unionization at Michelin plants in the province (LANGILLE, «Michelin Amendment in Context», (1981) 6 *Dalhousie L. J.* 523); the dismantling of the National Energy Program partially in response to the refusal of oil firms to continue investing in exploration; and the recent threats of General Motors to reduce the size of its Ontario operations if pension benefits legislation is amended to require indexation of pension payments, (*The Ottawa Citizen*, «Indexing Pensions Could Cost Jobs, GM Officials Warn» 17 April 1987).

21 *Op. cit.*, note 19.

22 *The Kendall Co.*, (1978) 17 L.A.C. (2d) 408. This might occur when workers individually decide to honour a picket line that has been set up by another union.

23 Note, however, the Canada Labour Relations Board has suggested that the definition of strike in the *Canada Labour Code*, which makes no reference to purpose, may not apply to political strikes: *British Columbia Telephone Co.*, [1980] 3 Can. LRBR 31. Another decision of the Board, however, has suggested that a party which resorts to economic sanctions, when no collective agreement is in effect, for the purpose of pressuring the government rather than compelling the other party to enter into a valid collective agreement, may be in breach of its duty to bargain in good faith: *Cyprus Anvil Mining Corporation*, (1976) 15 d.i. 194.

Even if there is no strike as prohibited by statute, the collective agreement itself may prohibit a wider range of interruptions to production so that the union may be found in breach of the collective agreement for organizing a political protest²⁴. Finally, individual workers who fail to show up for work as scheduled may be subject to discipline even if the union as an organization is not liable²⁵.

In those jurisdictions where the statutory definition required the additional element of purpose, courts and labour boards were divided on whether political strikes were statutorily permitted. In Nova Scotia, the Appeal Division of the Supreme Court held that a work stoppage was an illegal strike although its purpose was to protest the federal wage restraint program and was not designed to put pressure on the employer²⁶. The British Columbia Labour Relations Board, on the other hand, held that the same statutory definition of strike did not prohibit such political protest²⁷. It was still possible for the parties, in their collective agreement, to prohibit such action, however, and individual workers could be subject to discipline. It is, of course, important to note that the definition of strike in British Columbia has been amended to remove the third element of purpose, with the apparent consequence that political strikes are now banned in that province.

Even if political strikes are statutorily permitted, public service unions may be caught in a conundrum. These unions must demonstrate that their action is directed against the government in its role as government and not in its role as employer. For instance, the British Columbia Labour Relations Board has held that where the root cause of the employees' complaint rests in legislative enactment, but where the dispute may be resolved by a governmental concession in its role as employer, the job action is more likely to be characterized as a prohibited strike²⁸. Where the protest is aimed both at securing improvements in terms and conditions of work and simultaneously protesting limitations on the right to strike, as was in issue in the strike of government workers in Newfoundland in 1986 and the 1988 Alberta nurses' walkout, unions and their leaders may be subject to severe sanctions. What becomes apparent is that the division between economic and political issues is at best artificial and at worse serves to prevent extensive union participation in the process of policy formation.

²⁴ *Cardinal River Coals Ltd.*, [1978] 2 W.L.A.C. 417 (Alta.); *Pulp and Paper Industrial Relations Bureau*, [1977] 1 Can. LRBR 557 (B.C.).

²⁵ *Western Co-Op Fertilizers Ltd.*, [1977] 2 W.L.A.C. 669 (Alta.); *Dominion Bridge Co.*, (1977) 15 L.A.C. (2d) 295 (Sask.).

²⁶ *Re Robb Engineering and United Steelworkers of America Local 4122*, (1978) 86 D.L.R. (3d) 307.

²⁷ *British Columbia Hydro and Power Authority*, [1976] 2 Can. LRBR 410.

²⁸ *Government of the Province of British Columbia v. British Columbia Employees' Union*, (1980) 80 C.L.L.C. 16,055.

It is also clear that it is not merely overconcentration of political power in union hands which concerns adjudicators and legislators. The state's role in a capitalistic economy is to enhance the opportunity for capital accumulation which it attempts to do by limiting workers' ability to interfere with productivity. Employers are viewed as innocent parties, caught in the crossfire between unions and governments²⁹. Union tactics must defer to employers' needs even if this substantially reduces their ability to effectively promote the interests of members. This is especially ironical where wage restraint legislation is the target of the union protest since employers ultimately benefit, often at the workers' expense, from such a program.

POLITICAL STRIKES AND THE CHARTER

The *Canadian Charter of Rights and Freedoms*, enacted in 1982 guarantees, among other things, freedom of expression and freedom of association. Any law which abridges these constitutional freedoms and which cannot be justified in a free and democratic society will be either held to be invalid or be interpreted so as not to restrict the guaranteed freedom. The question is whether legislative restrictions on the right to engage in political strikes are invalid.

In a recent series of decisions, the Supreme Court has held that freedom of association in Section 2(d) of the Charter does not guarantee a constitutional right to strike. The three decisions concerned limits on the right to use strikes as a means of exerting economic pressure to force employers (both private and public) to agree to terms and conditions of work. Alberta legislation which prohibited strikes for government employees and public sector essential service workers was challenged in *Reference re Public Service Employee Relations Act* (the Alberta reference)³⁰. *Ad hoc* back-to-work legislation prohibiting strikes and lockouts in a dispute between dairies and their workers was challenged in *Government of Saskatchewan v. The Retail, Wholesale and Department Store Union Locals*, 544, 496, 635 and 955³¹. Finally, the federal 6 and 5 wage restraint program, which included severe limitations on the right to strike was considered in *Public Service Alliance of Canada v. The Queen*³². This paper will not undertake a complete analysis of those decisions, but a number of salient points will be highlighted.

²⁹ *Inco Ltd. v. United Steelworkers of America, Local 6166*, [1978] 3 W.W.R. 372 (Man. C.A.).

³⁰ *Supra*, note 5.

³¹ (1987) 38 D.L.R. (4th) 277, [1987] 3 W.W.R. 673, 87 C.L.L.C. 14,023.

³² (1987) 38 D.L.R. (4th) 249, 87 C.L.L.C. 14,022.

The majority judgements do not view the right to collectively bargain and the right to strike as fundamental rights or freedoms. The concurring opinion of McIntyre J. defines the freedom of association as the freedom to exercise such rights in association as have Charter protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. Thus freedom of association is characterized as essentially an individual right which does not confer any right on the group. Since the right to strike cannot by its nature be accorded to the individual, the group right to strike is not protected. Furthermore, the Court was reinforced in its view by its impression that the Charter was not primarily concerned with protecting economic interests which is presumed to be the primary goal of granting a right to strike.

Do these decisions preclude arguments that governments are constitutionally restrained from prohibiting political strikes? The answer, using McIntyre's analysis, depends on whether one could characterize the action of the individual in refusing to work as a constitutionally protected individual action or minimally, a legally permissible act by the individual. There are several problems with either characterization. First one must identify the constitutionally protected right. The obvious candidate is freedom of expression, but the difficulty is in determining whether such action can be identified as a form of expression. In *Retail Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*³³ the Supreme Court characterized the use of picketing as a form of expression even though the purpose is to exert economic pressure. By picketing a union is said to be making a statement to the general public. Whether the same can be said of a strike is more doubtful, although in the case of a political strike, it is more often the message than the economic impact of the action that is the primary concern of the strikers. In *Newfoundland Association of Public Employees v. The Queen in Right of Newfoundland*³⁴ it was stated that «a strike is not a form of expression that is protected» (emphasis in the original).

However, in *Re Health Labour Relations and Hospital Employees, Local 180*³⁵ an arbitrator held that workers' rights to attend a rally protesting government policy, and thereby not showing up for scheduled work, involved the exercise of Charter rights. However, the employer was nevertheless justified in disciplining the workers.

33 [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577.

34 (1985) 14 C.R.R. 193 at 224.

35 (1985) 18 L.A.C. (3d) 369 (Dorsey).

The second problem is that if one attempts to establish the associational right by reference to an individual right, *Dolphin Delivery* suggests that individual private law entitlements are not constitutionally protected. An individual who refused to work would be in breach of the individual contract of employment and the enforcement of the employer's rights in such a situation would not entail violation of constitutional guarantees, since the Charter protects individual rights from state interference, not from private law adjudication.

Despite these difficulties it is worth noting that several sources have suggested that political strikes can be distinguished from other kinds of strikes. In *Re United Glass & Ceramic Workers of North America and Domglas Ltd.*³⁶ the concurring opinion of Goodman suggests that there are constitutional limits on the right of a provincial government to interfere with the exercise of action directed at the federal government. J. Weiler also suggests that freedom of association, while not protecting the use of the strike as a mean of promoting the economic interests of workers nevertheless does protect political activity³⁷.

Indeed, McIntyre's concurring opinion in the *Alberta Reference*³⁸ states that one of the purposes served by association is making possible the effective expression of political views and thus influencing the formation of governmental and social policy. Chief Justice Dickson's dissenting opinion in the *Alberta Reference* rejected the argument that limiting the right to strike was justified as an attempt to ensure that government employees cannot, through their union, exert undue pressure on the government.

The right of workers to collectively withdraw their labour as a means of exercising political pressure in a liberal, capitalistic democratic state does not accord with the values on which such a state is founded. It challenges the belief that rights accord to individuals and not to groups and it challenges the dominance of capitalist concerns about ensuring continuing productivity and domination of policy determination at the state level. It is therefore predictable that courts, in determining whether freedom of association protects group action, are likely to adopt the individualist liberal view which is the bedrock of the judicial approach.

³⁶ *Op. cit.*, note 19.

³⁷ *Supra*, note 4.

³⁸ *Supra*, note 5.

UNION FUNDS FOR POLITICAL PURPOSES

Unions in Canada have forged close links with the New Democratic Party. The formation of the Party in 1961 was motivated, in part, by labour's desire not merely to have a party that was sympathetic to labour, but rather a party in which labour played a direct part³⁹. Unions have sought to be effective political actors through their formal alliances with the New Democratic Party, through financial support for both the Party and individual candidates and through active campaigning on behalf of the Party and its candidates and with respect to particular political issues. As Table 2 indicates, unions are a significant contributor of funds to the NDP, although by no means as significant as corporations are to the other two mainstream parties, or as significant as trade unions are to the Labour Party in Britain⁴⁰.

Table 2
Contributions to Federal Political Parties

Year	Type of Contributor	Party					
		Progressive Conservative		Liberal		New Democratic Party	
		Number	Amount (000's)	Number	Amount (000's)	Number ¹	Amount ¹ (000's)
1985	Individuels	75,117	7,872	28,545	3,129	97,364	4,612
	Corporations	15,789	6,693	3,775	2,432	278	58
	Trade Unions	--	--	4	1	949	869
1986	Individuels	52,786	7,875	35,369	5,753	90,487	5,036
	Corporations	12,680	7,301	6,221	4,856	555	178
	Trade Unions	1	2	7	5	944	1,172

¹The contributions to the New Democratic Party from trade unions take two forms, affiliation dues and voluntary contributions. In 1985, 695 union locals affiliated with the NDP paid dues of \$566,833 while there were another 254 contributions of \$302,568. In 1986, 725 affiliated union locals paid \$633,928 while there were another 219 contributions of \$538,856.

Source: Registered Parties Fiscal Period Returns

³⁹ G. HOROWITZ, *Canadian Labour in Politics*, Toronto, University of Toronto Press, 1968.

⁴⁰ The Labour Party derives up to 80% of its national funds from union subscriptions (Ken COATES and Tony TOPHAM, *Trade Unions and Politics*, Oxford, Basil Blackwell, 1986, at p. 102) while the figure for the NDP is closer to 20%.

There have, however, been a number of legal barriers which have restricted the range of union activities. In particular, unions may be legally restrained from spending dues collected from members for political purposes or may be restricted from campaigning either because of general election laws or because of the assertion of property rights by employers who object to union canvassing at the workplace.

The source of restrictions on the spending of union dues may either be legislative or constitutional. Legislative restrictions have taken several forms. For example, between 1920 and 1930 the federal statute governing elections prohibited unions from making financial contributions to political parties by promulgating a special rule for nonincorporated associations⁴¹. In the early 1960's both British Columbia and Prince Edward Island included provisions in their general labour relations statutes prohibiting unions from contributing any funds collected as part of dues check-off arrangement with the employer for political purposes. Since most unions collect their dues through such arrangements, this was an extremely effective barrier to political contributions. In a 1963 decision the Supreme Court upheld the constitutionality of the British Columbia legislation, rejecting the union's claim that the province could not interfere with federal elections⁴². It was stated that because the province, upon certification of the union, statutorily forced individuals into association, the legislature was entitled to protect the individual's civil rights «by providing that he cannot be compelled to assist in the financial promotion of political causes with which he disagrees»⁴³.

Although both British Columbia and Prince Edward Island repealed their general restrictions in the 1970's a number of jurisdictions continue to place limits on union political activities. For example, Québec's election law continues to prohibit union contributions to political parties while other jurisdictions limit the amounts which may be donated or require disclosure of donations⁴⁴. Furthermore, unions representing civil servants or crown employees are expressly prohibited by applicable collective bargaining statutes from using funds collected from its members for activities carried on behalf of any political party⁴⁵. This is in addition to the wide-ranging restrictions placed on individual civil servants to refrain from partisan political activity.

41 J. PATRICK BOYER, *Money and Message: The Law Governing Election Financing, Advertising, Broadcasting and Campaigning in Canada*, Toronto, Butterworth's, 1981.

42 *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, (1963) 41 D.L.R. (2d) 1 (S.C.C.).

43 *Ibid.*, 12.

44 *Op. cit.*, note 41.

45 See, for example, the *Ontario Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108, s. 1(1)(g).

By far the most important recent development, however, is the enactment of the Charter of Rights. Given the view already adopted by the Supreme Court of Canada in the right to strike cases discussed above, that the Charter is designed to protect individual fundamental freedoms, and not the rights of groups, it is quite possible that unions may be restricted from using their funds for partisan and other political activity.

Two cases have already been decided by lower courts. These cases arose in situations where unions, because of Rand Formula provisions in collective agreements, collected dues from non-member employees in the bargaining unit which they represented⁴⁶. In both cases, a non-member employee challenged the right of the union to spend any portion of the funds collected for non-collective bargaining purposes. In *Baldwin v. British Columbia Government Employees' Union*⁴⁷ case, the British Columbia Supreme Court held that the Charter did not apply to the essentially private relationship that exists between a union and those workers which it represents. While there may have been governmental action arising from the compelled payment of union dues, the plaintiff had not challenged the right of the union to collect dues, but rather the right of the union to decide how such money should be spent. The union was characterized as an essentially private association whose decision-making powers did not arise from statutorily created rights or powers. Hence, the Charter did not apply to its actions.

In the first stage of *Lavigne v. Ontario Public Service Employers Union*⁴⁸ the Ontario Supreme Court reached a very different conclusion. It decided that the Charter could apply to union expenditure of dues collected under a Rand Formula provision in the collective agreement. The Court found sufficient state action to justify the application of the Charter from both the legislative mandating of Rand Formula provisions in collective agreements and from the fact that the employer who agreed to the collective agreement provision, the Council of Regents of Ontario community colleges, was a Crown agency.

Furthermore, the Court decided that freedom of association guaranteed in Section 2(d) of the Charter included the individual's right not to associate. The union's expenditure of a portion of the dues which Lavigne was compelled to pay to the union for non-collective bargaining purposes, forced Lavigne to associate in ways which the Court held could not be justified in a free and democratic society.

⁴⁶ These are called Rand Formula provisions after Justice Rand of the Supreme Court, who, in a famous arbitration award, opted for this form of union security provision.

⁴⁷ (1986) 86 C.L.L.C. 14,059.

⁴⁸ (1986) 86 C.L.L.C. 14,039.

The concept of freedom of association as an individual right is adopted by the Court. In particular, Justice White claims that Canada's political tradition, based on a free and democratic political system, requires the individual exercise of judgement and decision-making. Further, our political tradition is said to be based on the belief in human worth and dignity which requires the protection of individual liberty. No attempt is made to develop an analysis of the role of groups in society. A communitarian perspective, which views the development of human worth and dignity as possible only through the agency of group activity is not canvassed as a possible alternative view of the base of our political tradition.

The concern that motivates the court's decision is the danger of coercing individuals to combine with others to pursue goals which the individuals do not share. The court accepts that such coercion is justifiable so long as the ends are economic ones related to the collective bargaining process. Once the coercion results in an individual being associated for the pursuit of other (including and perhaps especially, political) goals, it cannot be justified.

In the second stage of the *Lavigne* decision⁴⁹ Justice White had to choose an appropriate remedy. The applicant argued that unions could collect dues to be used for political purposes only from those workers who had given written authorization in advance (an opt in mechanism). Justice White decided, however, that an opt out option was sufficient to protect the individual's rights, so that, much like in Great Britain, the union could collect funds for political purposes until they had been notified by the individual of her or his desire to opt out. Furthermore it was necessary to determine for which kinds of union expenditures an individual could exercise an opt out right. Unions have the right to compell non-members who they represent to pay for collective bargaining and collective agreement administration. This could be stretched to include the promotion of international union solidarity by making donations to striking British miners and paying the costs of visiting Nicaraguan trade unionists. However, individuals could demand that their dues not be used for support of political parties, promoting nuclear disarmament, opposing the provincial funding of a domed stadium, charitable and humanitarian aid to Nicaragua, or supporting campaigns for free choice in abortion.

The impact of the *Lavigne* decision, if upheld on appeal, is difficult to assess. Firstly, the decision may extend beyond unions who bargain directly with the government or government agencies. Any jurisdiction which, like

⁴⁹ *Lavigne v. Ontario Public Service Employees Union (No. 2)*, (1987) 87 C.L.L.C. 14,044.

Ontario, contains a section in its labour relations statute requiring employers to collect the Rand Formula dues will likely bring the unions under the Charter. Secondly, it is not clear that the decision would apply to the expenditure of dues collected from individuals who are union members. If the courts regard union shops and closed shops as arising from the statutorily granted exclusive bargaining rights of unions, it is likely that the *Lavigne* decision would apply to workers who by collective agreement are required to be union members. Thirdly, the impact of the decision will depend both on where the boundary between collective bargaining and political activity is drawn. The decision gives some indication of this, but does not directly address the ability of unions to lobby on a range of issues such as government economic policy or protective legislation for workers. If union lobbying and non-partisan stances on political issues is on the political side of the dividing line, this could seriously hamper unions' ability to provide effective representation to members on a wide range of issues.

However, perhaps the most important factor will be the reaction of the unions themselves. Unions are likely to be most effective as political actors if they have the support of their members. If unions see this as an opportunity to educate those who they represent about the importance of political action, unions may emerge all the stronger. There is evidence that this has been the result in Great Britain where recent legislative requirements that unions hold ballots to demonstrate the support of their members before being able to continue the existence of their political action funds, has resulted in an increase in the number of unions with such funds⁵⁰.

UNION POLITICAL CAMPAIGNING

Restrictions on union actions which are designed to support political parties or candidates arise from two sources. Firstly, election laws may not only impose limits on the rights of unions to contribute financially to parties, as described above, they may also restrict unions from engaging in a variety of activities designed to influence the general public in its exercise of the vote. Secondly, union's attempts to canvass workers at the workplace may be frustrated by the employer's assertion of property rights.

The kinds of restrictions found in election laws on campaigning apply not only to unions. As Boyer (1983) has noted «the right to place partisan advertisements during an election campaign has been exclusively restricted

⁵⁰ STEELE, MILLER and GENNARD, «The Trade Union Act, 1984: Political Fund Ballots», *British Journal of Industrial Relations*, Vol. 24, No. 3, 1987, p. 443.

to candidates and parties»⁵¹. In one case, *R. v. Roach*⁵² a union official was charged pursuant to the *Canada Elections Act* for having arranged, on behalf of his union, to have a banner pulled by an airplane urging viewers against voting for the Liberal Party in a by-election. Roach was acquitted on the ground that the *bona fide* expression of views on issues of public policy was permitted by the statute. A subsequent amendment to the Act deleted the *bona fide* defence from the statute. However, the National Citizens' Coalition, a right wing group funded by large businesses, successfully challenged this restriction on the basis that it violated the guarantee of freedom of expression in Section 2(b) of the Charter⁵³. Hence both unions and other interest groups are now, in theory, equally able to engage in partisan activity. The irony, of course is that unions simultaneously are being limited in their political activity by the Charter arguments described above.

It is through effective communication with the employees they represent that unions are most likely to have the greatest success in influencing the outcomes of elections. Some evidence has been marshalled, for example, to demonstrate that a high proportion of union members are likely to vote for the New Democratic Party if the union of which they are a member is formally affiliated with the Party⁵⁴ (Archer, 1986). Unions, through their activist members at the workplace, may be extremely effective in developing the kinds of dialogue that lead to cohesive political action among the working group as a whole. However, the ability of unions to exploit the workplace as a forum for such political dialogue may be hampered by employer prerogatives based primarily on property rights.

In *Adams Mine*⁵⁵ the Ontario Labour Relations Board held that the Ontario *Labour Relations Act* did not prohibit an employer from banning union officials from canvassing fellow workers during non-working time while on the employers' premises. Although the Act prohibits employers from interfering with lawful union activities, the Board held that partisan political canvassing was not the type of union activity protected. The employers right to control activities on its property is regulated by the Act only to the extent necessary to promote collective bargaining and the economic interests of its members. The Board acknowledged that in some circumstances the political mobilization of workers may be so closely

⁵¹ *Op. cit.*, note 41.

⁵² (1978) 101 D.L.R. (3d) 736.

⁵³ *National Citizens Coalition v. A.G. for Canada*, (1984) 11 D.L.R. (4th) 481 (Alta. S.C.).

⁵⁴ K. ARCHER, «The Failure of the New Democratic Party: Unions, Unionists and Politics in Canada», *Canadian Journal of Political Science*, Vol. 18, No. 2, 1985, p. 353.

⁵⁵ (1982) 1 Can. LRBR (N.S.) 384.

related to terms and conditions of employment that employer interference with the mobilization may be statutorily limited. However, where the canvassing involves the support of one political party on the basis of a wide range of issues, the Board was unwilling to intervene on behalf of the union.

The narrow categorization of the purpose of the *Labour Relations Act* and the belief that one could separate collective bargaining from political issues reflect the same attitudes that inform the courts approach in the freedom of association cases. While unions may through their collective agreement obtain some protection against employer interference with political activities, this depends on their bargaining for political rights⁵⁶.

Supporters of the *Adams Mine* approach argue that unions should not be treated differently from any other group. Because the employer's property rights clearly justify limiting access by other groups, the same rules should apply to unions. This is based on the view that unions' only legitimate role is to promote the economic interests of those whom they represent and that political decision making is merely an individual right. It fails to understand that the development of political consciousness by workers is a dialectic process and that the logic of collective action for unions demands that unions be intimately involved in this process.

The political system in liberal democratic states assumes that each individual makes political choices to promote his or her best interests. However, the interests of an individual worker are intimately connected with the interests of workers as a group. This may not be immediately apparent to the individual. It is only by engaging the worker in a political dialogue that unions are able to determine the interests of the group as a whole and that the individual is able to realize his or her best interests. For unions to act as a collective voice in the political process and for them to be effective representatives of their members, they should have access in a forum which maximizes contact with workers. In this way, the vital links between the world of work and the world of politics will be realized.

CONCLUSION

Canadian unions have not had a great deal of success in developing a strong base for the exercise of political power. The legal barriers to such development are only a partial explanation for this lack of success. Undoubtedly ideological assumptions, organization structure, and other fac-

⁵⁶ *Air Canada*, (1980) 27 L.A.C. (2d) 389; *Salvation Army Grace Hospital*, (1985) 19 L.A.C. (3d) 441.

tors must be analyzed to have a more complete picture. Nevertheless, this overview of legal regulation demonstrates the difficulties in a liberal democratic state of accommodating the exercise of political power by workers in a collective fashion. The law reflects the liberal notions of individual autonomy and formal equality and ignores the end result which is that working class interests are not adequately reflected in the state policy-making process.

The judicial commitment to the promotion of individual autonomy has led to a reading of freedom of association which treats such freedom as an individual right. Unions are denied a constitutionally protected right to strike and individuals are entitled to opt out of the collective pursuit of political goals. This commitment to individual autonomy obscures the importance of community values and solidarity. The assumption that only the individual can attain the status of moral agent assumes that individuals are fully constituted within themselves.

However, individuals are in part, at least, constituted by the web of associative relations in which they are involved. These associative relations may be involuntary, such as familial ties or ethnic origins, or may be purely voluntary as membership in sports clubs. Membership in unions is somewhere in between these. Most employees may have a choice whether to work for a particular employer, but the vast majority have little choice but to be employed by somebody in order to gain a livelihood. Thus it is inevitable for most workers that they develop associative relations in the workplace, whether formal or informal. The essential identity of each individual worker is at least partially determined by these relationships. Unions serve as an organizational device to clarify and promote workers interests both in the collective bargaining process and in the political arena, assuming that the two can be logically distinguished. Tight legal limits on political action by unions is a major restriction on the ability of workers to fully realize their potential as political actors.

The practical consequence of such restrictions is the reinforcement of the status quo, with its unequal distribution of political and economic resources. Workers as individuals are unlikely to have much impact on the institutional structures which define and reinforce present distributions. The legal system, by characterizing the collective action of striking as undeserving of constitutional protection, and by treating collective union political activity as an invasion of individual autonomy, serves to legitimize existing inequalities. Unions are portrayed as disruptive groups whose power must be controlled. At the same time, the power of capital, which exceeds that of labour, is masked because capital need not seek major institutional changes to promote its interests. Finally, the role of unions as collec-

tive bargaining agents, because it is regarded by the legal system as primarily economic rather than political, can increasingly be infringed upon without appearing to violate fundamental rights.

The Charter of Rights has often been described as a two-edged sword, especially with respect to its impact on unions. However, it is looking more like a dagger aimed at unions which gives them little protection from government interference with the right to strike, which empowers groups like the National Citizens Coalition to engage in massive spending in pursuit of their political goals and which simultaneously limits unions' power to engage in political activity.

Unions must, however, if they are to remain effective, exploit such limits as do exist and engage their members in the process of developing political consciousness necessary for their survival.

Syndicats, politique et législation au Canada

Les syndicats canadiens affrontent un ensemble de circonstances sociales, économiques, juridiques et politiques susceptibles d'avoir une forte influence sur leur avenir. Le mouvement syndical est engagé dans un processus de réévaluation de son rôle au sein de la société canadienne, et l'une des avenues que les syndicats doivent envisager, c'est la mesure dans laquelle il leur faut participer aux affaires politiques. Cet article passe en revue quelques unes des options qu'ils ont choisies dans le passé et examine certains des types d'activité politique vers lesquels ils peuvent aujourd'hui s'orienter. L'accent est mis sur les contraintes juridiques pouvant entraver l'action politique des syndicats.

L'auteur étudie tout particulièrement les obstacles au droit de grève, à l'utilisation des cotisations syndicales à des fins politiques et au droit des syndicats de participer à des campagnes électorales. Ces contraintes se retrouvent dans les lois générales qui régissent la négociation collective, dans l'interprétation judiciaire, administrative et arbitrale de ces lois et des conventions collectives, dans les restrictions constitutionnelles en matière de libertés individuelles, dans les lois électorales et dans le droit de propriété et les prérogatives directoriales des employeurs.

La thèse mise de l'avant veut que les limitations imposées à l'activité politique des syndicats traduisent la conception à la fois individuelle et libérale de la législation canadienne qui considère avec méfiance le concept des droits collectifs. De plus, les restrictions favorisent la croyance libérale de l'existence d'une dichotomie entre les sphères d'action politique et les domaines de nature économique ou sociale. On a tendance, par exemple, à ne voir dans les grèves politiques, comme trait caractéristi-

que, que leurs seules conséquences économiques, tendance qui laisse une plus grande latitude aux syndicats dans la négociation collective que dans la recherche d'objectifs politiques.

Finalement, l'article souligne le peu de succès des syndicats canadiens dans l'établissement de bases solides en ce qui a trait à l'exercice du pouvoir politique. On ne peut qu'attribuer en partie seulement cette situation aux contraintes juridiques et il est souhaitable que les syndicats ne s'en tiennent pas uniquement à améliorer la protection légale de leur participation à l'action politique, mais aussi qu'ils incitent leurs membres à des formes variées d'échanges capables de développer leur engagement politique. C'est la condition essentielle pour que leur action soit efficace.

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